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IN THE

Supreme Court of the United States

FRANCIS EDWIN FROELICH,
Petitioner,

v.

THE LEWIS LAW FIRM, PC,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

REPLY TO OPPOSITION

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INTRODUCTION

The Petitioner will briefly address new points raised by the Respondent in the Brief in Opposition, No. 07-1130 (April 4, 2008) (Opposition) and highlight those parts of the Opposition that further support the Petition for Writ of Certiorari, No. 07-1130 (February 8, 2008) (Petition). Petitioner will first discuss some general deficiencies in the Respondent's argument, and then address specific issues raised in the Opposition in the order in which they appear.

GENERAL POINTS CONCERNING OPPOSITION

At the core of the Petition is the objection that Petitioner was ordered to forfeit more than $250,000 without any admissible evidence ever being considered. Recognizing this central issue, the Opposition fails to identify a trial or any other evidentiary hearing, because none was held. The Opposition also does not cite a single piece of admissible evidence on which Respondent's award of attorneys' fees could have been based, because no such evidence was ever introduced.[1]

The Opposition does not refute the central facts upon which the Petition relies: (1) that no evidence in support of Respondent's charges was adduced at any stage; (2) that Petitioner was afforded no opportunity to join issue, conduct discovery, or challenge such evidence as Respondent might have introduced; (3) that Petitioner was barred from pursuing any challenge to Respondent's charges, including Petitioner's attempts to initiate arbitration; and (4) that the matter was decided on a "petition" two weeks after it was filed, which Petitioner was never given an opportunity to answer.[2]

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[1] The reference in the Opposition to "billing statements," with a citation to the Fairfax Court record at pages "630-723," refers to a document filed by Respondent two months *after* entry of the order from which Petitioner appealed. Opposition at 4. The "responsive memorandum" adverted to by Respondent was a bare legal argument that neither authenticated nor offered into evidence any document or fact. *Id.*

[2] The "petition" filed by Respondent on January 19, 2007, was the first document that arguably provided notice of the specifics of Respondent's claims, in the nature of a complaint. Virginia law contains no procedure for responding to such a petition.

The Opposition also fails to cite any decision of a federal court at any level that would support the position that the procedures followed by the Virginia courts comported with due process. Respondent's failure to challenge Petitioner's substantial authority speaks volumes. Nowhere does Respondent meet the argument, or distinguish the numerous controlling decisions of this Court cited in support of the Petition. See Petition v-vi.

By conceding the operative facts and failing to cite any contrary authority, the Opposition effectively concedes that Petitioner was denied a "meaningful opportunity to be heard at a meaningful time" as required by the due process clause.

SPECIFIC NEW POINTS RAISED IN OPPOSITION

The Petitioner responds to the specific new points raised in the Opposition, in the order in which they appear.

I. Opposition Questions Presented

The questions proposed by Respondent bear little resemblance to the straightforward due process question presented in the Petition—i.e., may Virginia grant Respondent a judgment for $250,000 in legal fees without providing any process to test the validity of the claim?

II. Counterstatement

Respondent repeats the allegations, made repeatedly before the Virginia courts, that this is a simple collection case, and that the mere assertion that it was entitled to collect fees, without presenting admissible evidence, was sufficient for it to prevail. Opposition 2-7. This is not the dispute presented in

the Petition, or in the courts below, where Petitioner "denied that Respondent was entitled to the full amount of fees claimed," and "proffered that if given the opportunity to present evidence, he would prove that Respondent acted fraudulently and unethically, in contravention of its retainer agreement, and in violation of other provisions of law," and that "a substantial amount of Respondent's charges would not be recoverable."[3]

The Court need not determine which view of the facts is correct. The question presented by the Petition recognizes that there is a dispute over the merits of Respondent's claim, but questions the means employed by the Fairfax County Circuit Court (Fairfax Court) to resolve that dispute in Respondent's favor through a highly streamlined application of Virginia's Attorney's lien statute, Va. Code Ann. §54.1-3932. The Fairfax Court applied the lien statute to give the liens, which had been imposed without a prior hearing, the effect of a judgment.

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[3] Petition 8. Petitioner was prepared to develop and present evidence that Respondent inflated and falsified bills, committed fraud, breached fiduciary duties, and violated ethical obligations. Petitioner was aware of other former clients of Respondent who had similar contentions and were willing to come forward with evidence. Petitioner was prepared to offer the opinions of one or more experts that Respondent's billings were markedly out of line with the work performed, the documents generated, and the results achieved. Discovery would have disclosed Respondent's contemporaneous financial difficulties, culminating on December 27, 2006 with the filing by a major bank of a lawsuit against Respondent for defaulting on its primary line of credit; at or near the same time, it has been reported in the press, Respondent had failed to make payroll for its employees. Petitioner was denied any opportunity for discovery or to present any of this evidence.

This failure of the Virginia courts to require or even allow evidence on Respondent's claim is the foundation for the question presented to the Court in the Petition: Whether a state can authorize "the taking of property to satisfy a claim without any process to test the validity of the claim?"

III. The Issues Raised by the Petition are Certworthy.

Contrary to Respondent's argument (Opposition p. 8) the Petition presents a clear violation of due process by the Fairfax Court, and explicit affirmance of that decision by the Virginia Supreme Court.

Respondent appears, throughout the Opposition, to urge the adoption of a peculiar policy: that the judgments of state courts should be free from Constitutional scrutiny so long as the courts are silent about the reasons for their actions. The failure of a state court to explain its ruling cannot be held to insulate the ruling from review; the rulings of the Virginia courts are reviewable whether explained or not.

Petitioner cited numerous decisions of this Court in his attempt to challenge the procedures below. These cases were neither distinguished nor discussed by Respondent or the Virginia courts. The Virginia courts either rejected the due process objections out-of-hand, and without explanation, or found "no reversible error."

Respondent's reliance on *United States v. Johnston*, 268 U.S. 200, 227 (1925) is misplaced. Petitioner did not ask for review because there were "erroneous factual findings." Petitioner seeks review precisely because no evidence was received, and Respondent's implicit argument to the contrary is duplicitous. The

entry of a judgment based on mere allegations, not evidence, raises important federal Constitutional issues that have been taken up by the Court in a variety of contexts. Petition 23-24. This case presents the unique issue whether, and under what circumstances, a state may invest the bar with procedural advantages in the collection of fees that would not be available to any other creditor under the due process clause.

IV. The Issues were Preserved for Appeal.

The due process issues were preserved for appeal under state law, and Respondent's procedural argument that they were not is unfounded. The Petition was from the final order of highest court of Virginia, which did not rule based on the point of Virginia appellate procedure raised by Respondent,[4] but held that it was "of the opinion" that there was "no reversible error." The Virginia Court of Appeals did not decide that transcripts were necessary to determination of the appeal before transferring the matter to the Virginia Supreme Court, and indeed

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[4] Respondent's argument is incorrect under Virginia law for several reasons. Petitioner will not address these inaccuracies in detail, as the Virginia Supreme Court did not address them, instead holding that there was no error upon "review of the record." App. A, at 1a. In brief, Respondent well knows that there was never an evidentiary hearing to which transcripts might be relevant. Issues such as Petitioner's objection to the lack of an evidentiary hearing (Memorandum filed January 20, 2007, at 1-3, Record at 432-34), and assertion of that the dispute was subject to an arbitration agreement (*id.* at 5, Record at 436), which appeared on the face of the record, may be resolved on appeal without a transcript. *See Hanover County v. Bertozzi*, 256 Va. 350, 504 S.E.2d 618 (1998) (judgment reversed because record reflected no evidence had been admitted, although no transcript was filed).

noted that the court could and would "consider issues which may be decided without reference to a transcript." (Opposition, App. B, at 2a.)

Petitioner's written objections to the procedure employed by the Fairfax Court at every stage in the proceedings are documented in the record before the Supreme Court of Virginia and this Court. The record also contains the Fairfax Court's order of February 2, 2007, the central ruling which was affirmed on appeal below, reciting erroneously that a judgment had previously been entered;[5] ordering that Petitioner's assets were to be paid over to Respondent pursuant to the nonexistent judgment; and most notably, ordering Petitioner to cease and desist from any other litigation, including arbitration. There is no colorable argument that the due process issue was not preserved for consideration by this Court.

V. Petitioner was denied Due Process of Law.

Respondent argues that Petitioner was not denied due process because the Circuit Court of Fairfax County gave him "eight opportunities to address the merits." Opposition 12. This argument fails for three reasons.

First, Respondent concedes by its silence that no admissible evidence was ever introduced. Therefore, Respondent could not have met its burdens of production or persuasion. As such, there were no merits for Petitioner to address.

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[5] Respondent had filed its "Petition to Release Funds" only 14 days earlier.

Second, the "opportunities" cited in the Opposition occurred months after the first liens were placed on the Petitioner's property without any notice or a hearing. Therefore, none of the "opportunities" constituted prior hearings with respect to the liens, as required by the due process clause. Petition 14-21.

Third, the procedure followed by the Fairfax Court, affirmed on appeal, essentially burdened Petitioner with disproving Respondent's claim for fees, without granting him an opportunity to controvert Respondent's allegations or present evidence of his own. It remains uncontroverted that Respondent effectively obtained a substantial judgment against Petitioner, and executed on that judgment, without an evidentiary hearing, a summary judgment, or the introduction of evidence by any other means.

Each of the specific "opportunities to address the merits" raised in the Opposition is discussed in turn below.

The first opportunity, "briefing in opposition to his ex-wifes' motion filed December 22, 2005," was the opportunity to respond to a written motion filed by Petitioner's ex-wife which sought guidance on the disposition of certain assets in the divorce. There was no complaint or any other type of pleading framing Respondent's claims. There was no trial, and no opportunity to call or cross-examine witnesses, or to present other evidence. No evidence was presented for Petitioner to rebut. Therefore, this was not an opportunity to address the merits of Respondent's claim for fees.

The second opportunity, "oral argument on January 6th, 2006," was a motions hearing that lasted approximately 10 minutes. It was not a trial, no

witnesses were called and no evidence was received. In this proceeding, the Fairfax Court invited briefing on the question of what due process required, resulting in the third "opportunity," a "supplemental brief on January 20, 2006." This briefing was limited by order of the Fairfax Court to a five page discussion of the due process issue as it related to the placing of the liens. The merits of Respondent's claim were not addressed, nor did the court expect them to be.

The fourth "opportunity," an "oral argument on February 3, 2006," consisted of the Fairfax Court announcing its ruling on the due process objection, and inviting Respondent to file a petition to enforce its liens. The Fairfax Court did not allow Petitioner to speak before it announced its ruling and issued its order. See Petition 8. Again, there was no opportunity to address the merits.

The fifth and sixth "opportunities" were the briefing in opposition to Respondent's petition filed January 19, 2007, and the limited oral argument on the petition set by the Respondent on only two weeks' notice. Virginia law contains no procedure for responding to such a petition, nor did the Fairfax Court establish one, and Respondent nowhere suggests that Petitioner was in default in answering the petition. Moreover, at the hearing, no trial was held, no witnesses were called, no affidavits were received—indeed, no evidence was taken in any form. Respondent's "petition" was the first document filed that might arguably have been considered a pleading on the merits; yet, at this hearing, the Fairfax Court ruled that pursuant to a nonexistent judgment (presumably the order entered a year earlier, on February 3, 2006), Petitioner's property was to be turned over to Respondent, and that Petitioner was

to discontinue his efforts to arbitrate the dispute. Assuming for the sake of argument that the January 19, 2007 "petition" was the equivalent of a complaint, Petitioner should have been given the opportunity to answer it, conduct discovery and have issues of fact tried.

At the argument on February 2, 2007, Petitioner informed the Fairfax Court of the pending arbitration, having alerted the court to the existence of an arbitration agreement a year earlier. Petitioner provided the Fairfax Court with a copy of the arbitration panel's ruling that it had jurisdiction over the dispute, and asked that the arbitration be allowed to go forward. Alternatively, Petitioner asked the Fairfax Court for a trial in which he could challenge and rebut Respondent's evidence.

Because the Fairfax Court rejected Petitioner's request for an evidentiary hearing and ordered the arbitration terminated, there was no opportunity to address the merits at this or any stage. The Fairfax Court affirmatively denied Petitioner any opportunity to challenge Respondent's claim on its merits.

The last two "opportunities" cited in the Opposition did not even take place until after the Fairfax Court entered its final order, and were on an entirely different issue, that being security for the state appeal (and Respondent's effort to claim additional fees against Petitioner for "collection"). Having occurred after the final order, by definition these could not have been the prior hearings required by the due process clause.

Thus, nothing in the Respondent's Opposition rebuts or challenges Petitioner's fundamental assertion

that he was ordered by the Fairfax Court to forfeit property without a basic evidentiary hearing, pursuant Va. Code Ann. §54.1-3932, to pay the Respondent $150,000 in alleged attorneys' fees and other charges, and to forego any claim to a refund of the more than $100,000 he had previously paid to Respondent as a deposit. Petition 5-6. Respondent does not controvert the record facts that Petitioner was denied any opportunity to test Respondent's claim or the evidence supporting it, including by means of arbitration of the dispute between them.

CONCLUSION

For the reasons stated in the Petition, the petition for a writ of certiorari should be granted and the case set for plenary briefing and argument on the question presented in the Petition, or in the alternative, the Court should vacate, set aside or reverse the decisions below because the Virginia courts failed to provide due process of law or because the Virginia courts did not have jurisdiction over the dispute in light of the parties' agreement to arbitrate.

Respectfully submitted,

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